IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD KAGAN,	:	
Individually and as Trustee *Ad Litem*,	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION
HARLEY DAVIDSON, INC.,	:	
A/K/A HARLEY-DAVIDSON MOTOR CO., INC.,	:	NO. 07-0694
HARLEY-DAVIDSON MOTOR COMPANY	:	
GROUP, INC.,	:	
BUELL MOTORCYCLE COMPANY,	:	
Defendant.	:	
	:	

Memorandum and Order

YOHN, J. August ____, 2008

Richard Kagan, individually and as Trustee *Ad Litem*, brings this lawsuit against defendant Harley Davidson, Inc., asserting claims of strict liability, negligence, and breach of express and implied warranties in connection with his own injuries, and wrongful death on the same theories in connection with the death of his wife. Harley Davidson has filed counterclaims for negligence and negligence per se. On April 22, 2008, the court granted Harley Davidson's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 as to the express and implied warranty claims and ordered supplemental briefing on the strict liability and negligence claims. *See Kagan v. Harley Davidson, Inc.*, No. 07-0694, 2008 WL 1815308 (E.D. Pa. Apr. 22, 2008). The parties subsequently provided additional briefing as requested. For the reasons discussed below, the court will now grant Harley Davidson's motion for summary judgment as to the strict liability claim and deny it as to the negligence claim.

I. Factual and Procedural Background[1]

The prior Memorandum and Order set forth a detailed recitation of the facts underlying this lawsuit. *See id.* at *1-4. This section will therefore only address the facts relevant to the disposition of the strict liability and negligence claims.

This case arises from a June 26, 2004 single-motorcycle accident involving Kagan's 1995 Harley Davidson Sportster. The accident took place while Kagan was driving and his wife, Janet Martin, was riding as a passenger. Kagan bases the lawsuit on the theory that Harley Davidson defectively and negligently designed and manufactured the 1995 Sportster because it did not incorporate a Side Stand Interlock System ("SSIS") into the kickstand that would have shut off the motorcycle's engine if the kickstand was not fully retracted during operation.[2] At some point prior to the accident, the spring in Kagan's kickstand was bent, which prevented the kickstand from resting flush against the motorcycle's bumper. The evidence demonstrates that because the

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[1] The account contained in this section is comprised of both undisputed facts and Kagan's factual allegations, and all facts and inferences are viewed in the light most favorable to Kagan, the nonmoving party. *See Brown v. Muhlenberg Twp.*, 269 F.3d 205, 208 (3d Cir. 2001) (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n.6 (3d Cir. 2001)). Harley Davidson's statement of the facts is cited only where Kagan has specifically admitted that this version of the facts is undisputed.

[2] Although the parties interchangeably use the terms "kickstand," "side stand," and "jiffy stand," the court will only refer to the mechanism as the "kickstand." The previous opinion described how the kickstand functions:

> The kickstand is comprised of a bracket or yoke, a kickstand leg, and a spring. When the motorcycle is in operation, the spring holds the kickstand leg in the fully retracted (up) position, flush against the motorcycle's rubber bumper. When the motorcycle is not in operation, the kickstand is placed in the fully deployed (down) position and holds the motorcycle upright. The kickstand is designed to move easily rearward and upward toward the fully retracted position when the weight of the motorcycle is not resting on the stand.

Kagan, 2008 WL 1815308, at *1 n.3.

kickstand did not fully retract, it may have released and hit the roadway immediately before the accident. Kagan asserts that if Harley Davidson would have designed and manufactured the motorcycle with an SSIS, he would have been aware that the kickstand was not fully retracted because the engine would have shut off, and the accident would not have occurred.

Kagan bought the 1995 Sportster from his wife's son and his stepson, Adam Martin, in May or June 2004. (Dep. of Richard K. Kagan 175:17-176:14, July 17, 2007; Dep. of Adam Martin 21:6-25, Aug. 16, 2007.)[3] The Harley Davidson service manual Martin gave Kagan when he delivered the motorcycle to Kagan (Kagan Dep. 179:8-12), included the following warning:

> Be sure jiffy stand is fully retracted before riding. If jiffy stand is not fully retracted during vehicle operation, unexpected contact with the road surface can distract the rider. While the jiffy stand will retract upon contact, the momentary disturbance and/or rider distraction can lead to loss of vehicle control resulting in personal injury and/or vehicle damage.

(D. Mot. for Summ. J. Ex. C). The service manual also provided instructions on how to care for the motorcycle's kickstand and included a close-up photograph depicting how the kickstand appears when it is fully retracted. (*Id.*) The instructions in the manual further explained that "[i]n retracted position (up), jiffy stand leg should be securely seated against frame-mounted rubber bumper." (*Id.*)

Kagan attended a Basic Motorcycle Rider Course offered by the Pennsylvania Department of Transportation, and he completed this course on June 19, 2004. (Def.'s

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[3] Seven individuals owned Kagan's 1995 Sportster prior to Kagan, and Kagan purchased the motorcycle approximately nine years after the original purchase. (Def. Undisputed Facts ¶ 45; Def. Mot. for Summ. J. Ex. F.) The motorcycle was stolen from the original owner at one point, but it was subsequently recovered. (Def.'s Supplemental Br. on Strict Liability 3, ¶ 22.) There is no record of the subject motorcycle being in any accident prior to Kagan's accident. (*Id.* at 7, ¶ 50.)

Supplemental Br. on Strict Liability 1, ¶ 2.) During this course, Kagan learned that he should conduct a preride check of the motorcycle prior to each use of the motorcycle and that a component of this check included inspecting the motorcycle's kickstand. (*Id.* at 1, ¶ 3.)

The 1995 Sportster was in the same condition on the day of the accident as it was on the day Martin delivered it to Kagan. (Kagan Dep. 201:14-18.) Kagan did not inspect the kickstand to determine its condition prior to the accident, and he did not know that the spring on the kickstand was bent or that the kickstand sagged down. (*Id.* at 204:1-21, 359:8-360:8.)

The accident took place on June 26, 2004 while Kagan and his wife were traveling on Route 10 on their way from Montgomeryville, Pennsylvania to Lancaster, Pennsylvania. (*Id.* at 257:21-258:7, 359:3-8.) Kagan lost control of the motorcycle while navigating a curve to the left, the motorcycle left the roadway as Kagan exited the curve, and Kagan and his wife were thrown from the motorcycle. (Pl. Statement of Facts ¶ 30.) Kagan does not remember the accident, what caused him to lose control of the motorcycle, or whether the kickstand touched the roadway prior to the accident. (Kagan Dep. 266:2-16, 288:1-12, 297:3-10.) He suffered serious injuries from the accident, and his wife died from the injuries she sustained. (Pl. Statement of Facts ¶ 30.)

Scott King, Kagan's expert witness, concluded that the spring in the kickstand was bent after Harley Davidson had manufactured and marketed the 1995 Sportster, but prior to Kagan's accident. (Dep. of R. Scott King 141:13-16, 340:7-10, 340:18-23, 347:10-21, Oct. 22, 2007.) He also concluded that the bent spring prevented the kickstand from fully retracting, and if the spring had not been bent, the kickstand would have fully retracted. (*Id.* at 141:17-142:11.) To test the angle at which the kickstand sagged, King manually held the kickstand up against the bumper

and then dropped it. (*Id.* at 308:2-6, 342:1-12, 343:16-19.) He "eyeballed" the angle and estimated that the kickstand sagged between twenty-two and one-half degrees to thirty degrees off of the bumper. (*Id.* at 343:8-15.)[4] King tested the operation of the kickstand and concluded that other than the sagging due to the bent spring, the kickstand operated correctly and was not defective. (*Id.* at 198:7-199:2, 340:11-17.)

Based on witnesses' statements[5] and the evidence of scraping on the tip of the kickstand, King determined that Kagan's kickstand came into contact with the ground during the accident. (*Id.* at 142:12-143:6.) He opined that the kickstand would not have touched the ground if the spring had not been bent. (*Id.* at 143:7-13.)

King concluded that the absence of an SSIS contributed to Kagan's accident because if one had been in place, it would have sensed the sagging kickstand and would have "notified" Kagan that there was a problem with the motorcycle. (*Id.* at 405:17-12, 406:6-12.)[6] King opined that any motorcycle made from 1995 onward that did not have an SSIS associated with the

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[4] This sag was approximately one inch past the three-quarters of an inch sag that was observed in the photographs of the 1995 Sportster taken after the accident. (*Id.* at 308:7-22.)

[5] Matthew and Julianna Fuellner were traveling directly behind Kagan at the time of the accident. (Dep. of Julianna Fuellner 33:16-22, Sept. 19, 2007.) Both of the Fuellners observed that the kickstand was hanging down approximately three-quarters of the way off the motorcycle's bumper prior to the accident. (*Id.* 43:18-24, 60:13-14; Dep. of Matthew Fuellner 25:4-7, Sept. 19, 2007.) Mrs. Fuellner initially testified in her deposition that she saw the kickstand contact the roadway during the accident, but at two later times during the deposition, she testified that she did not observe the kickstand contact the roadway. (J. Fuellner Dep. 9:10-15, 54:21-22, 60:5-9.) Mr. Fuellner testified that he did not see the kickstand contact the roadway, but that while speaking with an officer at the scene, he observed a gouge in the highway at the location where the motorcycle first started to leave the highway. (M. Fuellner Dep. 12:7-15, 25:10-15.)

[6] King also concluded that the kickstand contacting the roadway and Kagan's speed were additional factors that contributed to the accident. (King Dep. 143:14-21, 399:20-400:1.)

kickstand is a defective product. (*Id.* at 139:16-140:2, 385:13-21.) He further explained that a motorcycle without an SSIS is a defective product because of the risk of crash, loss of control, or injury that could occur if the kickstand contacts the ground during the motorcycle's operation. (*Id.* at 140:3-5.)[7]

King did not identify a particular type of SSIS that should be installed on the 1995 Sportster, but he explained how the system should work. (*Id.* at 358:11-359:2, 359:2-4.) In his opinion, the SSIS should have a plunger switch to sense when the kickstand is fully retracted at a flush position against the bumper. (*Id.* at 359:9-21.) If the kickstand sags to a predetermined angle while the operator is driving the motorcycle, the switch activates the SSIS. (*Id.* at 374:9-375:7.) The SSIS then provides an interrupt signal to the ignition circuit and a grounding signal to the tachometer circuit in the ignition and interrupts the ignition or firing of the spark plugs. Thus, the SSIS shuts the engine off if the kickstand partially deploys while the transmission is in gear. (*Id.* at 359:9-21, 360:1-4.) King approximated that the SSIS should activate when the kickstand is deployed approximately a quarter of an inch or one-half of an inch. (*Id.* at 360:11-17.)

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[7] King noted that there would not necessarily be an accident or loss of control and the driver may not even notice every time the kickstand contacts the roadway. (King Dep. 140:6-20, 327:17-20.) He also testified that, assuming the kickstand hit the ground on the day of Kagan's accident, it was possible that this did not cause the accident. (*Id.* at 327:5-20.) He noted that it was possible that if Kagan's motorcycle had an SSIS, if the SSIS had activated while Kagan was navigating the curve, this also could have contributed to an accident. (*Id.* at 391:1-7.) King opined, however, that this possibility was unlikely because if the SSIS worked properly, it would have notified Kagan there was a problem with the kickstand prior to the curve. (*Id.* at 391:8-14, 392:3-10.) He further explained that he did not know if an SSIS would have actually prevented Kagan from operating the motorcycle on the day of the accident, but he was certain that Kagan would have been aware there was a problem with his 1995 Sportster if there had been an SSIS on the motorcycle. (*Id.* at 398:12-19.)

King acknowledged that an SSIS could result in the engine being shut off while the operator was driving at highway speeds, and that if an SSIS completely cuts off the engine, loss of control and an accident could result. (*Id.* at 374:17-375:1, 389:10-18, 390:7-18.) He also acknowledged that in general, this can be a safety hazard and is not "desirable." (*Id.* at 390:19-23.) Alternatively, King explained that if the kickstand is bouncing up and down, when it bounces down it could activate the SSIS and cut off the engine, and when it bounces back up, it could deactivate the SSIS and restart the engine, causing a "hiccup." (*Id.* at 375:8-376.19.) King acknowledged that this hiccup could also distract the operator and cause an accident that could result in death, but he opined that an accident due to a hiccup is less likely than an accident due to one of the motorcycle parts coming into contact with the roadway. (*Id.* at 376:20-378:20.)

Thomas Carter, Harley Davidson's expert, examined Kagan's 1995 Sportster and concluded that the kickstand retraction mechanism functioned properly, but the kickstand did not retract fully. He estimated that the kickstand retracted to approximately three-fourths of an inch from the motorcycle's rubber bumper. (Def.'s Reply Ex. P, Report of Thomas Carter ¶¶ 60.50.6, 60.50.10, Sept. 10, 2007 ("Carter Report").) This resulted in a seven degree sag. (*Id.* ¶ 60.50.6.) After examining the damage patterns on the kickstand and the location of the damage, Carter concluded that the damage to the kickstand's spring occurred prior to Kagan's accident. (*Id.* ¶ 6.52.)

Carter determined that the bent spring in Kagan's motorcycle sometimes caused the kickstand to contact the ground during left turns. (Dep. of Thomas J. Carter 102:9-15, Dec. 19, 2007.) According to Carter, this contact did not cause any disturbance to the motorcycle or the operator. (*Id.* at 102:16-103:4.) He also opined that the kickstand may have contacted the

roadway while Kagan was navigating the curve immediately prior to the accident, but there was no evidence that this contact disturbed the motorcycle. (*Id.* at 60:22-61:8.) He explained that a kickstand's partial deployment, or sagging, would only cause a disturbance when it touched the ground if there was a binding system on the kickstand that did not allow the kickstand to retract. (*Id.* at 78:2-24.) He explained that the kickstand on the 1995 Sportster has one of the best retraction mechanisms available because it is a weight-bearing stand, and once the weight is removed from the kickstand, it requires very little effort for the kickstand to fold upward because it is an almost automatically folding stand. (*Id.* at 79:24-80:12, 80:20-80:4, 81:1-4.)

Carter testified that an SSIS is typically installed to prevent drivers from riding away with the kickstand fully deployed or to prevent the motorcycle's operation when the kickstand is deployed near the center point, when the kickstand's contact with the roadway would disturb the motorcycle. (*Id.* at 77:11-23.) Because the kickstand in the 1995 Sportster is a weight-bearing stand, there are no problems with operators driving away with the kickstand deployed. (*Id.* at 80:22-24.)[8]

Carter also summarized the results of tests he conducted on twenty-two motorcycles to determine at what angle of deployment the SSIS either turns off the engine or prevents the engine from starting. (Carter Report ¶ 13.1.) Of the motorcycles tested, four of them had an SSIS that engaged when the deployment angle was approximately ten to fifteen degrees, one motorcycle was equipped with an SSIS that engaged at approximately fifty degrees, four motorcycles had an

[8] Harley Davidson contends that the kickstand's design and operation comply with all Federal Motor Vehicle Safety Standards and the Society of Automotive Engineers Standards. King did not find any area where the kickstand's design or operation did not comply with these standards. (Pl.'s Supplemental Br. on Strict Liability 2-3, ¶ 18.)

SSIS that engaged at approximately sixty to seventy degrees, and ten motorcycles had an SSIS that engaged at approximately eighty to ninety degrees. (*Id.* ¶¶ 13.3.1-13.3.22.) Three of the motorcycles tested were not equipped with an SSIS, one because it had been removed by a prior owner, and the other two because the motorcycle had a rubber retraction assist device. (*Id.* ¶¶ 13.3.9, 13.3.11, 13.3.16.) None of these twenty-two motorcycles was manufactured by Harley Davidson.

II. Legal Standard

Either party to a lawsuit may file a motion for summary judgment, and it will be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the nonmoving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-

movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Furthermore, "[a]ll justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* "Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990) (citation omitted). The nonmovant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production; the nonmovant must present concrete evidence supporting each essential element of its claim. *Anderson*, 477 U.S. at 252; *Celotex*, 477 U.S. at 322-23.

III. Discussion

A. Strict Liability Claim

Kagan brings a claim for strict liability against Harley Davidson in Count I. He asserts that Harley Davidson defectively designed and manufactured the 1995 Sportster because the kickstand's design did not include an SSIS, and this rendered the motorcycle unreasonably dangerous for its intended use.[9]

As both parties acknowledge, Pennsylvania law governs this diversity case. Pennsylvania

[9] Although Kagan's Complaint included a claim based on a manufacturing defect, the parties did not address this claim in their original briefs or in the supplemental briefs. Courts apply the same risk-utility analysis to both design defect and manufacturing defect claims. *See Lancenese v. Vanderlans & Sons, Inc.*, No. 05-5951, 2007 WL 1521121, at *2-3 (E.D. Pa. May 21, 2007). Thus, for the same reasons that Harley Davidson's motion for summary judgment on Kagan's design defect claim will be granted, it will also be granted on the manufacturing defect claim.

law follows section 402A of the Second Restatement of Torts for strict liability claims.[10] *Webb v. Zern*, 220 A.2d 853, 854 (1966). Under Pennsylvania law, a plaintiff may bring a strict liability claim premised on the theory that the product was defectively designed. *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1022 (Pa. 1978). To prevail on such a claim, "the plaintiff must prove (1) that the product was defective, (2) that the defect existed when it left the hands of the defendant, and (3) that the defect caused the harm." *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 224 (Pa. Super. Ct. 1997) (citing *Ellis v. Chi. Bridge & Iron Co.*, 545 A.2d 906, 909 (Pa. Super. Ct. 1988)).

In Pennsylvania, the threshold determination in strict liability claims for defective design is whether the product is "unreasonably dangerous." *Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 538 (3d Cir. 2007); *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1042 (3d Cir. 1997); *Azzarello*, 391 A.2d at 1026; *Riley v. Warren*, 688 A.2d at 224. The judge makes this determination prior to trial. *Moyer*, 473 F.3d at 538; *Surace*, 111 F.3d at 1049 n.10. When determining whether a product is unreasonably dangerous, the judge must "engage in a risk-utility analysis, weighing a product's harms against its social utility." *Surace*, 111 F.3d at 1044. This risk-utility analysis determines "whether a product's condition justifies placing the risk of loss on the supplier." *Id.* at 1042. "[T]he question for the court to determine is whether the evidence is sufficient, for purposes of the threshold risk-utility analysis, to conclude as a matter

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[10] The relevant provision of Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . , if
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> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

of law that the product was not unreasonably dangerous, not whether the evidence creates a genuine issue of fact for the jury." *Id.* at 1049 n.10.

Pennsylvania courts and the Third Circuit have identified seven factors that judges may consider when engaging in this analysis:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole; (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury; (3) The availability of a substitute product which would meet the same need and not be as unsafe; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) The user's ability to avoid danger by the exercise of care in the use of the product; (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instruction; and, (7) The feasibility, on the part of the manufacturer, of spreading the loss of [sic] setting the price of the product or carrying liability insurance.

Id. at 1046 (quoting *Dambacher v. Mallis*, 485 A.2d 408, 423 n.5 (Pa. Super. Ct. 1984)); *see also* *Riley v. Warren*, 688 A.2d at 224-25. The judge determines whether a product is unreasonably dangerous "under a weighted view of the evidence, considering the facts in the light most favorable to the plaintiff." *Moyer*, 473 F.3d at 538 (citing *Phillips v. A-Best Prod. Co*, 665 A.2d 1167, 1171 n.5 (Pa. 1995)).

If the judge determines as a matter of law "that the risk-utility balance so favor[s] the manufacturer that the [product] could not be deemed unreasonably dangerous," then the claim does not go to the jury. *Surace*, 111 F.3d at 1048. On the other hand, "[i]f the judge concludes that a product is 'unreasonably dangerous' the case is submitted to the jury, which then decides, based on all the evidence presented, 'whether the facts of the case support the averments of the complaint.'" *Moyer*, 473 F.3d at 538 (quoting *Azzarello*, 391 A.2d at 1026). "[T]he jury

considers whether the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Id.* at 532 (internal quotation marks and citations omitted).

The parties did not address adequately whether the 1995 Sportster is unreasonably dangerous in their original memorandums. Because the judge must make this determination prior to trial, I ordered supplemental briefing on the issue. As Harley Davidson correctly notes in its supplemental brief, the focus for this analysis is whether the 1995 Sportster was unreasonably dangerous at the time it was marketed, not whether it was unreasonably dangerous at the time of the accident. *See Surace*, 111 F.3d at 1053 ("This threshold analysis focuses on the condition of the product at the time it is marketed . . . .").[11] Both parties agree that the spring in the kickstand was not bent at the time it left Harley Davidson's control—i.e., at the time it was marketed. (Def.'s Supplemental Br. on Strict Liability 4, ¶¶ 23-24; Pl.'s Supplemental Br. on Strict Liability 3, ¶¶ 23-24.) Thus, the risk-utility analysis focuses on whether a 1995 Sportster with a kickstand that is not bent but that does not contain an SSIS is unreasonably dangerous.[12]

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[11] Despite correctly recognizing this point, in some of its arguments Harley Davidson focuses on the bent spring as the defect at issue and argues that under Kagan's theory of the case, the bent spring caused the accident. The arguments that focus on the bent spring as causing the accident are not relevant to whether the motorcycle was unreasonably dangerous because Kagan's theory is that the lack of an SSIS, not the kickstand spring, was the design defect. Furthermore, causation cannot be weighed by the trial court "as a factor in resolving the legal question of risk allocation," *Surace*, 111 F.3d at 1053, so whether the bent spring or the lack of an SSIS caused the accident is not relevant to the threshold determination of whether the 1995 Sportster is unreasonably dangerous without an SSIS.

[12] As a threshold matter, Harley Davidson asserts that it is entitled to summary judgment on Kagan's strict liability and negligence claims because the undisputed facts show that there was no commercially available SSIS technology that would have prevented Kagan's accident. King concluded that the kickstand sagged to approximately one and three-quarters inches, or to an angle somewhere between twenty-two and one half degrees and thirty degrees. (King Dep.

1. Utility of the 1995 Sportster to Kagan and to the public as a whole.

The first factor includes an analysis of the usefulness and desirability of the 1995 Sportster, including its utility to Kagan and to the public as a whole. Kagan concedes that the 1995 Sportster is a useful product, but argues that this factor weighs in his favor because the 1995 Sportster would have more utility if it had an SSIS. The applicable case law, however, shows that the analysis under this factor does not compare the product as designed to the product as the plaintiff proposes. In *Surace*, a construction worked brought a strict liability claim against the manufacturer of a pavement profiler after his foot was backed over by the profiler. The plaintiff argued that the profiler was unreasonably dangerous because it did not include a lockout/tagout device, which would have prevented the profiler's operator from reversing the profiler unless it was activated by ground crew. The Third Circuit concluded that "[t]he profiler is, of course, useful and desirable," demonstrating that the analysis was whether the profiler as it was actually designed and manufactured had any utility. *See Surace*, 111 F.3d at 1053. Thus, the correct focus of the first factor in Kagan's claim is whether the 1995 Sportster as it was actually designed and manufactured by Harley Davidson was useful and desirable; not whether the proposed changes would increase the product's utility. *See id*; *see also Epler v. Jansport, Inc.*, No. 00-154, 2001 WL 179862, at *3 (E.D. Pa. Feb. 22, 2001) (concluding that the utility of the product as a whole is the relevant focus of the first factor, not the utility of any allegedly

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308:2-6, 342:1-12, 343:8-19.) Carter concluded that the kickstand sagged to three-fourths of an inch, or to a seven degree angle. (Carter Report ¶ 60.50.) Viewing the disputed facts in the light most favorable to Kagan, the evidence demonstrates that during operation, the kickstand sagged to up to thirty degrees. There is evidence in the record of SSIS technology that activated at angles less than thirty degrees, so Harley Davidson is not entitled to summary judgment on this basis.

defective parts, and collecting cases that have reached the same conclusion). Therefore, Kagan's theory that the 1995 Sportster would have more utility and would be more desirable if it contained an SSIS is not applicable.[13] Moreover, even if the factor looked at the motorcycle with the SSIS, it clearly would have utility to the public.

Harley Davidson asserts that the 1995 Sportster is unquestionably useful and desirable as a convenient and efficient method of transportation and as a recreational vehicle. Harley Davidson points out that Kagan voluntarily purchased the 1995 Sportster and that multiple owners used the 1995 Sportster over a nine-year period, all evidencing the 1995 Sportster's utility. Other courts have concluded that repeated use of a product is evidence of its utility. *See, e.g.*, *Short v. WCI Outdoor Prods., Inc.*, No. 99-3526, 2000 WL 1659938, at *5 (E.D. Pa. Nov. 2, 2000). The court agrees that Kagan's voluntary use of the 1995 Sportster and previous owners' use of the motorcycle over a nine-year period evidences that it is a useful and desirable product.

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[13] Kagan relies on *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1009 (Pa. 2003), to support his argument that even thought the 1995 Sportster is a useful product, the utility factor weighs in his favor because if the 1995 Sportster had an SSIS, it would have a greater social utility. In the portion of *Phillips* that Kagan relies on, the Pennsylvania Supreme Court was analyzing the duty prong of the plaintiff's negligence claim, specifically the factor that required looking at the social utility of the defendant's conduct, to determine whether the defendant owed a duty of care to the plaintiff. *Id.* at 1008-09. The court found that this factor weighed in favor of the plaintiff because if the defendant had produced the product at issue with an additional safety feature—a device that would prevent small children from using the product—the defendant's conduct would have had a greater utility. *Id.* at 1009. The *Phillips* court's reasoning is not applicable here because the court was analyzing the defendant's conduct under a negligence claim, and not the product itself under a strict liability claim. As the *Phillips* court explained, "negligence and strict liability are distinct legal theories. Strict liability examines the product itself, and sternly eschews considerations of the reasonableness of the conduct of the manufacturer. . . . In contrast, a negligence cause of action revolves around an examination of the conduct of the defendant." *Id.* at 1008 (internal citation omitted). The court also explained that "the elements of the causes of action are quite distinct." *Id.* Accordingly, the analysis of the utility of a defendant's conduct under the negligent design claim in *Phillips* is not applicable to analysis of the utility of the product itself under Kagan's strict liability claim.

This factor therefore weighs in Harley Davidson's favor.

2. The likelihood that the 1995 Sportster will cause injury, and the probable seriousness of any injury caused.

The second factor requires looking at the safety aspects of the 1995 Sportster and focuses on the likelihood that the 1995 Sportster will cause injury and the probable seriousness of any injury caused. The analysis under this factor looks at the likelihood the 1995 Sportster will cause injury when it is in the condition it was in when it was marketed; thus, its condition immediately prior to the accident, which took place years after it was marketed, is not relevant. *See Surace*, 111 F.3d at 1053.

Kagan contends that the likelihood of a sagging kickstand coming into contact with the roadway increases during left-hand turns, which in turn increases both the probability of injury and the seriousness of the injury. Kagan further argues that because a motorcycle accident can result in serious bodily injury or death, this factor weighs in his favor.[14] Kagan's arguments center on accidents that would take place if the kickstand sagged. However, for purposes of the strict liability analysis, the relevant inquiry is the likelihood of accidents actually occurring and the seriousness of injury resulting from those accidents based on the condition of the 1995 Sportster as it was marketed—based on a motorcycle that does not have a sagging kickstand. *See Surace*, 111 F.3d at 1053. Thus, Kagan's arguments on this factor are not persuasive because

[14] Kagan also argues that because Harley Davidson warned users of the risks inherent in driving a motorcycle with the kickstand not fully retracted, it necessarily recognized the likelihood and seriousness of injuries. The warnings address whether an accident was foreseeable, and the foreseeability of injury is not an appropriate consideration for strict liability claims. As the Pennsylvania Supreme Court has explained, "strict liability affords no latitude for the utilization of foreseeability concepts." *Phillips*, 841 A.2d at 1006. Because foreseeability cannot be considered, as discussed below, courts have looked at the actual rate of injury when analyzing this factor.

they are not based on the correct condition of the motorcycle.[15]

Harley Davidson argues that this factor weighs in its favor because between 1989 and 2003, Harley Davidson produced 314,752 Sportster model motorcycles with the same kickstand assembly as the 1995 Sportster, and there is no evidence of any claims regarding personal injury or death as a result of a kickstand coming into contact with the roadway. (*See* Def.'s Supplemental Br. on Strict Liability Ex. Q.) Harley Davidson further argues that there is no evidence that any of the prior owners of Kagan's 1995 Sportster had a similar accident in the previous nine years of the motorcycle's use.[16]

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[15] The cases Kagan relies on to support his assertion that this factor weighs in his favor are also not persuasive. First, *Pacheo v. Coats Co.*, 26 F.3d 418 (3d Cir. 1994), did not address the likelihood that the product at issue would cause injury or the probable seriousness of any injuries that could be caused; rather, it addressed intended use and causation, which are not relevant to this factor. Second, in *McMullen v. Crown Equipment Corp.*, No. 00-1366, 2004 WL 887470 (E.D. Pa. Mar. 31, 2004), the plaintiff produced specific statistical evidence regarding the accident rate of the model of the product at issue and specific evidence regarding the severity of the injuries operators of the product suffered as a result of those accidents. The district court denied the defendant's motion for summary judgment because the defendant did not address the plaintiff's statistical evidence regarding the likelihood of accidents and the severity of the injuries resulting from those accidents. Rather, the defendant only argued, without relying on any expert report, evidence, or case law, that the accident levels and severity of injuries were *de minimis*, and this was not sufficient. *Id.* at *1-2. Here, Kagan has not provided any statistical evidence comparing the accident rate for motorcycles with and without an SSIS when the motorcycle has a properly functioning, weight-bearing stand. King opined that an accident due to an SSIS causing a hiccup in operation is less likely to occur than an accident due to a bent or sagging kickstand touching the ground, but that comparison is not useful to this factor because it compares accident rates when the kickstand is in a condition such that it sags during operation. As explained above, this factor focuses on the accident rate of the 1995 Sportster in the condition it was in when Harley Davidson marketed it—without a bent kickstand spring and with a kickstand that remained flush against the bumper during operation.

[16] Harley Davidson additionally argues that this factor weighs in its favor because the kickstand conformed to the Federal Motor Vehicle Safety Standards and the Society of Automotive Engineers Standards. The fact that the kickstand conformed to safety standards is not relevant to the likelihood the 1995 Sportster will cause injury.

"It is appropriate to consider the actual rate of injuries caused by a particular product" when considering the second factor in the risk-utility analysis. *Lancenese*, 2007 WL 1521121, at *3. Accordingly, courts have looked at the statistical rate of injuries caused by using the product, and when the likelihood that the product as marketed will cause serious injury is low, courts have concluded that this factor weighs in favor of the manufacturer. *See, e.g., id.* (finding that factor two weighed in the manufacturer's favor because the manufacturer had received only four reported claims of injury from the product); *Warnick v. NMC-Wollard, Inc.*, 512 F. Supp. 2d 318, 326 (W.D. Pa. 2007) (concluding that factor two weighed in the manufacturer's favor because the plaintiff had used the product for twenty years and had only sustained two minor injuries); *Epler*, 2001 WL 179862, at *3 (reasoning that factor two weighed in the manufacturer's favor because it produced evidence that out of the 78,333 units of the product sold, the plaintiff's lawsuit was the only notification it had of any problems, accidents, or injuries associated with that product); *Van Buskirk ex rel. Van Buskirk v. West Bend Co.*, 100 F. Supp. 2d 281, 286 (E.D. Pa. 1999) (finding that factor two weighed in the manufacturer's favor because there was evidence of low accident rates from other manufacturers' similar products and because there had been only one other strict liability claim regarding the product brought against that manufacturer in the proceeding ten years, during which time 500,000 units of the product had been manufactured); *Monahan v. Toro Co.*, 856 F. Supp. 955, 959 (E.D. Pa. 1994) (concluding that factor two weighed in the manufacturer's favor because the evidence demonstrated a low serious accident rate of one death per 102,000 uses of the product).

Other than the fact of his own accident, Kagan has not supplied any evidence regarding the likelihood of injuries, or the probable seriousness of those injuries, resulting from the 1995

Sportster's lack of an SSIS.[17] Nor has he presented any evidence of the likelihood of any injury from any other types of motorcycles manufactured without an SSIS. The fact that some accidents and some injuries may occur during a product's use does not automatically render a product defective. *Lancenese*, 2007 WL 1521121, at *3; *Monahan*, 856 F. Supp. at 959. Furthermore, the fact that Kagan and his wife sustained serious injuries is not sufficient to weigh factor number two in Kagan's favor because the relevant inquiry is the overall likelihood of injuries and the seriousness of the injuries, not whether one or two people suffered serious injuries. *Accord Riley v. Becton Dickinson Vascular Access, Inc.*, 913 F. Supp. 879, 884-85 (E.D. Pa. 1995) (concluding that the fact that the plaintiff suffered the most serious of possible injuries was not sufficient under factor two because the relevant inquiry is the general, theoretical risk of injury and the seriousness of the injury).[18] Because Harley Davidson has supplied evidence that tends to show a low likelihood of injury caused by the lack of an SSIS in the 1995 Sportster and similarly designed motorcycles and Kagan has presented no contrary evidence, the second factor weighs in Harley Davidson's favor.

3. The availability of a substitute product which would meet the same need and not be as unsafe.

The third factor requires an analysis of the availability of a substitute product that would

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[17] When considering that the relevant inquiry is the likelihood of injuries caused by the lack of an SSIS in the 1995 Sportster when it is in the same condition it was in when marketed—when the kickstand was not sagging—there is no evidence of injuries; Kagan's accident does not fall in this category because his 1995 Sportster was not in the same condition it was in when it was marketed.

[18] Harley Davidson's evidence that Martin drove the same motorcycle through the same curve without incident or injury and Carter drove an exemplar motorcycle through the same curve without incident or injury is similarly unpersuasive because this evidence focuses on two individual operators, not on the overall risk of serious injury.

meet the same need as the 1995 Sportster (that does not have an SSIS) and would not be as unsafe as the 1995 Sportster. "The proposed alternative design must be 'safer overall.'" *Van Buskirk*, 100 F. Supp. 2d at 287 (quoting *Riley v. Becton*, 913 F. Supp. at 886).

The evidence demonstrates that the SSIS technology was available in 1995 and that other manufacturers were using it in motorcycles manufactured prior to and at that time. (*See* Carter Report ¶¶ 13.3.14, 13.3.16, 13.3.21.)[19] There is no evidence that the 1995 Sportster with an SSIS would not meet the same need as the 1995 Sportster without an SSIS. Therefore, the contested issue under the third factor is whether the 1995 Sportster with an SSIS would be safer overall than the 1995 Sportster without an SSIS.

Harley Davidson argues that factor three weighs in its favor because there is no evidence in the record demonstrating that the lack an SSIS rendered the 1995 Sportster unsafe. A manufacturer is not liable "for failing to make an already safe product somewhat safer. Or for failing to utilize the safest of all possible designs." *Pascale v. Hechinger Co.*, 627 A.2d 750, 753 (Pa. Super. Ct. 1993); *see also Warnick*, 512 F. Supp. 2d at 327 (concluding that "the mere allegation that a safer design exists . . . does not constitute a design defect because liability is not imposed on a manufacturer for failing to make an already safe product somewhat safer"). Harley Davidson further contends that an SSIS presents other safety risks and therefore would not make

[19] The fact that other manufacturers utilized the SSIS technology only demonstrates that the technology was available. This fact is not determinative as to whether Harley Davidson should have utilized the technology and whether the 1995 Sportster was unreasonably dangerous without the technology because evidence regarding industry standards and the practices of other manufacturers has no bearing on the strict liability analysis. *See Monahan*, 856 F. Supp. at 960 (citing *Holloway v. J.B. Sys., Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979); *Lewis v. Coffing Hoist Div., Duff-Norton*, 528 A.2d 590, 594 (Pa. 1987)).

the 1995 Sportster safer.[20]

King opined that the 1995 Sportster with the properly functioning kickstand was defective because it did not have an SSIS. He further opined that an SSIS would make the 1995 Sportster safer because an SSIS would provide notification if there was an issue with the kickstand and, therefore, would prevent accidents.[21] Viewing this evidence in the light most favorable to Kagan, as I must for this analysis, suggests that the 1995 Sportster was unsafe without an SSIS and receiving notification if there is a problem with the kickstand position of the 1995 Sportster would make it safer overall. Thus, the third factor weighs in Kagan's favor.[22]

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[20] The cases Harley Davidson relies on to support its arguments on this factor are not persuasive. In *Warnick*, there was evidence in the record that the safety changes proposed by the plaintiffs actually made the product more dangerous. *See* 512 F. Supp. at 327. Here, while there is evidence that there are risks associated with an SSIS, there is no evidence that an SSIS would make the 1995 Sportster more dangerous overall. The other cases cited by Harley Davidson are not applicable to this factor because they address whether the proposed changes could "eliminate" the risks, and that is the correct consideration for the fourth factor, not the third.

[21] Kagan notes that Harley Davidson recognized that the motorcycle engine is less likely to shutdown because of an SSIS activating than because of other factors, such as fuel pump failure or circuit breaker failure, and argues that factor three weighs in his favor because of this. However, the fact that other factors not related to an SSIS are more likely to cause the motorcycle engine to shut off during operation is irrelevant to whether the 1995 Sportster with an SSIS is more or less safe than the motorcycle without an SSIS. Furthermore, Harley Davidson acknowledged this in the context of addressing the ways in which an SSIS would pose a risk to operators. Thus, it does not support Kagan's implication that Harley Davidson viewed the SSIS as safe.

[22] Although this factor weighs in Kagan's favor, the record does not support his contention that "[t]he use of this technology would have prevented Plaintiff a[s] well as any other operator from using the motorcycle with the kickstand not fully retracted." (*See* Pl.'s Supplement Br. on Strict Liability 10.) The evidence in the record demonstrates that in motorcycles that utilize an SSIS, there is always some amount of sag between the motorcycle and the kickstand before the SSIS activates and either notifies the operator of a problem or turns off the engine. (*See, e.g.*, Carter Report ¶ 13.3 (identifying nineteen motorcycles manufactured between 1984 and 2006 that utilized an SSIS and noting that the SSIS on four motorcycles engaged when the deployment angle was ten to fifteen degrees, on one motorcycle engaged at

4. Harley Davidson's ability to eliminate the unsafe character of the 1995 Sportster.

The fourth factor addresses Harley Davidson's ability to eliminate the unsafe character of the 1995 Sportster without impairing its usefulness or making it too expensive to maintain its utility. Kagan argues that this factor weighs in his favor because an SSIS would make the 1995 Sportster more useful and because implementing an SSIS would not be too expensive. Harley Davidson contends that this factor weighs in its favor because the record demonstrates that an SSIS poses its own safety risks, so an SSIS would not eliminate risks.

Nothing on the record demonstrates that an SSIS would impair the usefulness of the 1995 Sportster. Harley Davidson does not argue that the financial cost of implementing an SSIS is too expensive, and it does not refute Kagan's contention that it would cost approximately twenty dollars per motorcycle. Thus, the only contested aspect of this factor is whether the addition of an SSIS would eliminate an unsafe characteristic of the 1995 Sportster.

As recognized by King, if an SSIS activates while the operator is driving the motorcycle at highway speeds and completely cuts off the engine, it could cause loss of control and an

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fifty degrees, on four motorcycles engaged at sixty to seventy degrees, and on ten motorcycles engaged at eighty to ninety degrees).) Furthermore, when Harley Davidson began discussing implementation of an SSIS into the 1998 Sportster, it proposed activating the SSIS at a twenty to twenty-five degree deployment angle. (*See* Pl.'s Mot. in Opp'n to Summ. J. Ex. J.) Finally, even though King's proposed version of an SSIS allowed for less sag than any of the other versions identified in the record, it still allowed for a small amount of sag before the SSIS would activate. King also admitted that although the SSIS he proposed would alert the driver to a problem with the kickstand, it would not necessarily prevent the operation of the motorcycle, and the driver could ignore the notification provided by the SSIS and continue to drive even if the kickstand were sagging. (King Dep. 398:12-399:19.) Thus, the record demonstrates that an SSIS would notify the driver of a problem after a certain amount of sag—not as soon as the kickstand was not fully retracted, or not flush against the bumper—and even though an SSIS would notify the driver of a problem, it might not necessarily prevent operation of the motorcycle.

accident. (King Dep. 374:9-375:7, 389:10-18, 390:7-18.) King also acknowledged that this is a safety hazard, and in general, it is not "desirable." (*Id.* at 390:19-23.)[23] He further noted that if the SSIS causes a hiccup, the hiccup could also distract the operator and could cause an accident. (*Id.* at 375:8-378:20.) This evidence cannot lead to the conclusion that a 1995 Sportster with an SSIS would have eliminated the unsafe character associated with Kagan's use of the 1995 Sportster. Furthermore, as discussed above, the evidence in the record also demonstrates that even when there is an SSIS on a motorcycle, there can be some degree of sag in the kickstand before the SSIS activates. Thus, in addition to posing additional risks, an SSIS would not fully eliminate the risks relevant here. The fourth factor therefore weighs in favor of Harley Davidson. *Accord Riley v. Becton*, 913 F. Supp. at 889 (concluding that the fourth factor weighed in the defendant's favor because, inter alia, there was no way to completely eliminate the risks associated with the allegedly unsafe design, and the proposed alternative design contained additional risks that could not be completely eliminated); *Warnick*, 512 F. Supp. 2d at 328 (concluding that the fourth factor weighed in the defendant's favor because of uncontradicted evidence that the proposed alternative design would not eliminate the unsafe character of the product).

[23] King specifically acknowledged that outside the context of this case, the possibility of having the engine cut off when the 1995 Sportster is being operated at highway speeds is not desirable. This is the relevant context for this analysis because the unreasonably dangerous analysis focuses on the safety aspects of the 1995 Sportster in general, not just whether it would have been better for this specific user, Kagan, to have the engine cut off.

5. An objective motorcycle user's ability to avoid danger by the exercise of care in the use of the 1995 Sportster.

The fifth factor analyzes the user's ability to avoid danger by exercising due care in the use of the product from an objective perspective. The relevant inquiry under this factor looks at "an ordinary product user's conduct" and specifically focuses on "the ordinary consumer who purchases or uses the product." *Surace*, 111 F.3d at 1051. Accordingly, "[t]he proper focus . . . is an objective inquiry into whether the class of ordinary purchasers of the product could avoid injury through the exercise of care in use of the product, not whether this particular plaintiff could have avoided this particular injury." *Id.*[24]

The parties focus on whether Kagan failed to exercise due care in the use of the 1995 Sportster. As noted, because the fifth factor is an objective factor, "[a]n individual plaintiff's failure to exercise care in the use of a product is not relevant to whether the product is unreasonably dangerous in the first place." *Surace*, 111 F.3d at 1050. Most of the parties' arguments on this factor are therefore not relevant.[25]

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[24] The Third Circuit has acknowledged that it is not clear whether the Pennsylvania Supreme Court would actually apply this factor because that court has explicitly stated that due care is irrelevant to strict liability. *Surace*, 111. F.3d at 1051. However, the Third Circuit explained that the Pennsylvania Supreme Court's rejection of due care in strict liability is premised on its concern that negligence concepts should be divorced from strict liability concepts. *Id.* at 1051-52. The Third Circuit reasoned that this prong does not insert negligence concepts into strict liability law; rather; "it informs the decision as to whether the product, as designed, is not reasonably safe when used as intended." *Id.* at 1052. Thus, the Third Circuit has articulated and applied this factor as an objective standard, and it has specifically reminded district courts that this factor "is . . . not a vehicle for injecting a plaintiff's (alleged) failure to exercise due care into the case." *Id.* at 1051.

[25] Kagan argues that it would be unreasonable to conclude that he should have noticed the bent spring because it was not found by the employees who worked at the Harley Davidson dealership where Martin purchased the 1995 Sportster or by the four state inspectors who inspected the motorcycle while Martin owed it. This argument fails because it focuses on a

Under the guidance set forth by the Third Circuit, the correct inquiry under this factor is whether an ordinary class of motorcycle operators could avoid injury through the use of due care in operating the 1995 Sportster that did not contain an SSIS, not whether a particular user would have noticed that the kickstand had a bent spring.[26] The record shows that Pennsylvania's Basic Rider Course for licensed motorcycle drivers includes specific instructions to check the condition of the kickstand before every ride. (*See* Def.'s Supplemental Br. on Strict Liability 1, ¶ 2.; *id.* Ex. H.) The service manual from Harley Davidson for the 1995 Sportster also includes specific instructions regarding the maintenance and inspection of the kickstand and pictures of how the kickstand should look when it is installed and operating correctly. (Def.'s Mot. for Summ. J. Ex. C.) It also warns against operating the motorcycle if the kickstand does not fully retract. (*Id.*) This evidence leads to the conclusion that the exercise of due care for an ordinary class of motorcycle operators would include k**nowledge of how to avoid an injury associated with the lack of an SSIS by frequently and properly inspecting the kickstand, as instructed by multiple sources, to ensure that it operates properly. The fifth** factor therefore weighs in Harley Davidson's favor.

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subjective application of this factor, does not focus on the condition of the 1995 Sportster as of the time it was marketed, and because it is not supported by the record. The record only shows that the spring in the kickstand bent sometime after Harley Davidson manufactured the motorcycle and sometime prior to Kagan's accident, which occurred nine years later. Nothing in the record demonstrates that the kickstand spring was bent when Martin purchased the 1995 Sportster or when he took it to the four state inspectors; thus, even if the court could look at this evidence subjectively and could consider the condition of the 1995 Sportster with the bent kickstand spring, it still could not conclude that the Harley Davidson dealer who sold the motorcycle to Martin or the four state inspectors should have noticed that the spring was bent.

[26] Kagan's argument that he should not have been expected to repair the kickstand because he did not know the kickstand did not fully retract is therefore also not applicable.

6. The user's anticipated awareness of the dangers inherent in the 1995 Sportster and the avoidability of these dangers.

Under the sixth factor, the focus is on the user's anticipated awareness of the dangers inherent in the 1995 Sportster and how to avoid those dangers, either because of general public knowledge of the obvious condition of the product or because of the existence of suitable warnings or instruction regarding the dangers. *See Surace*, 111 F.3d at 1052. Kagan concedes that he was aware it would be dangerous to operate a motorcycle with a kickstand that was not fully retracted. He argues, however, that because there was not an SSIS on the 1995 Sportster, he was not able to ascertain that the kickstand did not fully retract when the motorcycle was in operation. He also contends that any warnings regarding the dangers associated with operating a motorcycle with the kickstand deployed are not effective if the driver does not know that the kickstand deploys during operation. Kagan's arguments on this factor are not persuasive because he focuses on whether he should have known the kickstand had a bent spring, and not on the relevant inquiry, which is the general user's anticipated awareness of the dangers inherent in the 1995 Sportster and how to avoid those dangers, either because of general public knowledge of the obvious condition of the product or because there were suitable warnings and instructions regarding the dangers.

This factor weighs in Harley Davidson's favor because there were sufficient warnings and instructions for the 1995 Sportster, and in particular for the operation of the kickstand. The Basic Rider Course that Kagan completed instructed operators to check the condition of the kickstand prior to each use of the motorcycle. Additionally, the 1995 Sportster's service manual contained the following warning:

> Be sure jiffy stand is fully retracted before riding. If jiffy stand is not fully retracted during vehicle operation, unexpected contact with the road surface can distract the rider. While the jiffy stand will retract upon contact, the momentary disturbance and/or rider distraction can lead to loss of vehicle control resulting in personal injury and/or vehicle damage.

(D. Mot. for Summ. J. Ex. C.) The service manual also included specific instructions on how to remove, clean, lubricate, and install the kickstand. (*Id.*) Furthermore, it included pictures of how the kickstand appears when it is functioning correctly. (*Id.*) Thus, because there were suitable warnings and instructions on how to avoid the relevant dangers associated with the 1995 Sportster, the sixth factor weighs in favor of Harley Davidson. *Accord Lancenese*, 2007 WL 1521121, at *4 (concluding that the sixth factor weighed in the manufacturer's favor because the warnings attached to the product were sufficient to provide the user with awareness of the dangers inherent in the product and how to avoid those dangers).

7. The feasibility of spreading the loss.

The seventh and final factor looks at the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. All manufacturers can typically spread loss by pricing the product appropriately or by carrying liability insurance. Resolving this factor, however, depends on a balancing of the other six factors in the risk-utility analysis. "If after examining the first six factors, the utility of the product outweighs its risks, then shifting the cost of the plaintiff's loss to the defendant is not fair, and therefore, not feasible." *Lancenese*, 2007 WL 1521121, at *5; *see also Riley v. Becton*, 913 F. Supp. at 880 (concluding that "when consideration of the preceding six factors leads to the conclusion that the utility of [the] product in question outweighs its risks, such determination compels the further conclusion that shifting the cost of plaintiff's loss to the manufacturer of the

product is not fair, and, therefore, not feasible"); *Monahan*, 856 F. Supp. at 955 (same).

As discussed above, five of the first six factors weigh in Harley Davidson's favor. Thus, the utility of the 1995 Sportster outweighs its risks, and it would not be appropriate or feasible to force Harley Davidson to spread the risk of loss. Accordingly, the seventh factor also weighs in Harley Davidson's favor.

As the Pennsylvania Superior Court has recognized, "any motorized vehicle carries certain substantial risks to the user, and such products are not unreasonably dangerous merely because they may be involved in accidents or because an operator may be injured during their use." *Riley v. Warren*, 688 A.2d at 229 (citing *Monahan*, 856 F. Supp. at 963). An analysis of the seven factors using a weighted view of the evidence before the court leads to the conclusion that the condition of the 1995 Sportster—the condition that it was in as of the time it was marketed—does not justify placing the risk of Kagan's loss on Harley Davidson.[27] The risk-utility balance favors Harley Davidson and, therefore, the court cannot conclude that the 1995 Sportster is unreasonably dangerous as a matter of law. Kagan's strict liability claim therefore cannot proceed to the jury, *see Surace*, 111 F.3d at 1048, and the court will grant Harley Davidson's motion for summary judgment on this claim.

B. Negligence Claim

Kagan brings a negligence claim against Harley Davidson in Count II. It was not clear from the arguments in the original briefs whether Kagan was basing this claim on the assertion that (1) Harley Davidson was negligent because it had a duty to exercise reasonable care to

[27] All seven factors do not have to weigh in Harley Davidson's favor in order for the court to conclude that the 1995 Sportster is not unreasonably dangerous. *See Riley v. Warren*, 688 A.2d at 225 & n.3.

design and manufacture a reasonably safe motorcycle and breached this duty, causing his accident; or (2) Harley Davidson was negligent because it had a duty to design and manufacture a motorcycle in 1995 that contained an SSIS and breached this duty, causing his accident. The court therefore ordered Kagan to clarify the negligence claim on which he is proceeding. Kagan has clarified that he is proceeding on the latter theory.[28]

In order to prevail on a negligence claim under Pennsylvania law, a plaintiff must establish

> (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another.

Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366 (3d Cir. 1993) (citing *Morena v. S. Hills Health Sys.*, 462 A.2d 680, 684 n.5 (Pa. 1983)). The primary element to consider is the duty of care the defendant owed to the plaintiff. *Phillips*, 841 A.2d at 1008 (citing *Althaus v. Cohen*, A.2d 1166, 1168 (2000)).

Ultimately, determining whether a duty exists under a particular set of facts is a question of fairness. *Brandjord v. Hopper*, 688 A.2d 721, 723 (Pa. Super. Ct. 1997); *see also Atcovitz v.*

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[28] In the supplemental brief on this issue, he stated "Plaintiff has set forth a claim that the Defendant Harley-Davidson was negligent in the manufacture of Plaintiff's 1995 Sportster Motorcycle as the result of the failure of Defendant to include a[n SSIS]." (Pl.'s Supplemental Br. on Negligence 3.) Thus, Kagan has stated that he is proceeding on a negligent manufacture theory, and not on a negligent design theory. A manufacturing defect claim focuses on a breakdown in the actual production of the product, whereas a design defect claim focuses on which parts will be included in the product and how those parts will be configured. Given the substance of Kagan's arguments and the evidence in the record, it appears that the focus of his claim is actually a negligent design claim. There is nothing in the record from either party regarding the manufacture of Kagan's 1995 Sportster. Thus, the court will read into the substance of the arguments and not the simple one-sentence statement regarding Kagan's claim and will analyze the claim under the negligent design rubric.

Gulph Mills Tennis Club, Inc., 812 A.2d 1218, 1222 (Pa. 2002) ("[T]he legal concept of duty is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice, and society."); *Gutteridge v. A.P. Green Servs., Inc.*, 804 A.2d 643, 655 (Pa. Super. Ct. 2002) ("The mere fact an accident occurred does not entitle the injured person to a verdict.") (citing *Ney v. Axelrod*, 723 A.2d 719, 721 (Pa. Super. Ct. 1999)). The issue of whether a defendant owes a duty to a plaintiff is a question of law for the court to decide. *Kleinknecht*, 989 F.2d at 1366; *R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2005). However, where the existence of a duty depends on the outcome of the facts, the jury must make a conclusion as to the facts before the issue of whether the defendant owed the plaintiff a duty of care can be resolved. Restatement (Second) of Torts § 328B cmt. e (1965) ("Where the existence of the duty will depend upon the existence or non-existence of a fact as to which the jury may reasonably come to either one of two conclusions . . . then it becomes the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to such fact is drawn.") Thus, if a plaintiff has produced sufficient evidence such that there is an issue as to whether the defendant owed him a duty of care, a negligence claim will survive summary judgment. *See Phillips*, 841 A.2d at 1010 (analyzing the five factors relevant to duty and concluding that the plaintiff "had adduced sufficient evidence such that [the negligence] claims survive[d] summary judgment on the issue of the existence of a duty of care").

Pennsylvania courts use the following five factors to determine whether a defendant owes a duty of care to a plaintiff: "(1) the relationship between the parties; (2) the social utility of the [defendant's] conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the [defendant]; and (5) the overall public interest

in the proposed solution." *See Phillips*, 841 A.2d at 1008 (citation and quotation marks omitted). None of the factors is dispositive; "[r]ather, a duty will be found to exist where the balance of these factors weighs in favor of placing such a burden on a defendant." *Id.* at 1008-09.[29]

1. The relationship between Kagan and Harley Davidson.

Under the first factor, the relationship between the parties, Kagan asserts that there is clearly a relationship between himself and Harley Davidson because Harley Davidson manufactures motorcycles for sale to the general public, and Kagan, a member of the public, purchased the motorcycle. Harley Davidson contends that because Kagan did not purchase the motorcycle from Harley Davidson, there is no relationship.[30]

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[29] Harley Davidson asserts that it is entitled to summary judgment on Kagan's negligence claim because Kagan assumed the risk of his accident when he operated the motorcycle with the sagging kickstand, even though he had been warned about the risks of doing so. The Pennsylvania Supreme Court has "in essence" abolished assumption of the risk as an affirmative defense, except in cases involving express assumption of the risk or alleging strict liability, or where assumption of risk is specifically preserved by statute. *Howell v. Clyde*, 620 A.2d 1107, 1113 n.10 (Pa. 1993) (plurality opinion). Assumption of the risk therefore cannot be an affirmative defense to Kagan's negligence claim. It is, however, relevant to an analysis of the duty Harley Davidson owes to Kagan. *See Kaplan v. Exxon Corp.*, 126 F.3d 221, 225 (3d. Cir. 1997) (analyzing Pennsylvania law on assumption of the risk and concluding that "the assumption of risk analysis is incorporated into the duty analysis"). As the *Howell* court explained, "no duty exists only if reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury." 620 A.2d at 1113. Here, there is evidence to show that reasonable minds could disagree over whether Kagan knew the specific risks inherent in operating his 1995 Sportster, and this precludes a determination that Harley Davidson did not owe a duty to Kagan on the basis of assumption of the risk.

[30] The cases Harley Davidson relies on, *Berrier v. Simplicity Corp.*, 413 F. Supp. 2d 431, 444 (E.D. Pa. 2005) and *Phillips*, 841 A.2d at 1009, do not support Harley Davidson's position because they are not factually on point regarding this factor. The courts in these two cases did not conclude that there was no relationship between the parties because the relevant plaintiffs had not purchased the product from the manufacturer. Rather, in both cases the courts concluded that the was no relationship between the parties because the plaintiffs simply had not purchased the product; they were using a product that had been purchased by someone else. Here, on the other

The Pennsylvania Supreme Court has previously concluded that the first factor can weigh in favor of the plaintiff even where there is not a direct relationship between the plaintiff and the defendant. In *Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215, 1219-20 (Pa. 2003), the Pennsylvania Supreme Court addressed whether there was a sufficient relationship between the plaintiff and the defendant, a hospital that had been contracted by the plaintiff's employer to provide urine testing, for the first factor to weigh in favor of finding a duty. The court reasoned that the relationship between the plaintiff and the hospital was sufficient to weigh in favor of finding a duty because the hospital "was aware of the purpose of the urine screening" and "should have realized that any negligence with respect to the handling of the specimen could harm [the plaintiff's] employment." *Id.* at 1219. Similarly, Harley Davidson was aware that the purpose of the 1995 Sportster was for it to be used by the general public, and it should have been aware than any negligence with regard to the motorcycle's design could result in injuries to operators. The fact that Kagan purchased it from someone other than Harley Davidson does not negate the relationship because it is the design of the motorcycle that is the issue, not the purchase of the motorcycle. There is a sufficient relationship between the two parties because Kagan is the purchaser-user and Harley Davidson is the designer. Thus, factor one weighs in favor of finding a duty.

2. The social utility of Harley Davidson's conduct.

The second factor addresses the social utility of the defendant's conduct. The relevant inquiry is the social utility in Harley Davidson's conduct of designing the 1995 Sportster without an SSIS. Kagan concedes that a motorcycle has social utility because it can be used for

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hand, Kagan purchased and used the product at issue.

transportation and recreational riding, but he argues that the 1995 Sportster's social utility is not increased by a lack of the SSIS technology. Rather, he argues that because a kickstand coming into contact with the roadway can cause a momentary disturbance or distract the operator, this can cause an accident, which would be prevented by the addition of an SSIS. Harley Davidson contends that this factor weighs in its favor because both experts agree that the kickstand is well designed, Harley Davidson does not have evidence of accidents occurring from 1989 to 2003 because of a kickstand coming into contact with the roadway, and plaintiff's own expert concedes that there are safety risks associated using an SSIS.[31]

Although Harley Davidson's evidence shows that the 1995 Sportster may not have resulted in accidents, the evidence in the record also demonstrates that an SSIS may have made the 1995 Sportster safer. If Harley Davidson could have designed a safer product but did not do so, this factor would not weigh in its favor. *See Phillips*, 841 A.2d at 1009 (concluding that the product as manufactured had social utility but that the evidence demonstrated that the proposed safety device would prevent accidents and "would have great utility in our society," so the factor weighed in favor of finding a duty). Viewing the evidence in the light most favorable to Kagan, there is a genuine issue as to whether Harley Davidson's conduct had social utility because it might not have designed the safest product possible. Thus, the evidence sufficiently demonstrates for purposes of summary judgment that this factor weighs in favor of finding a duty.

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[31] Harley Davidson repeatedly notes that the kickstand met all applicable standards set forth by the Federal Motor Vehicle Safety Standards and the Society of Automotive Engineers Standards and that this should be read as eliminating its liability. Under federal law, however, compliance with the motor vehicle safety standards does not eliminate common law liability. *See* 49 U.S.C. § 30103(e).

3. The nature of the risk imposed and foreseeability of the harm incurred.

The third factor looks at the nature of the risk imposed and the foreseeability of the risk in question. Therefore, this inquiry is into the risk imposed by designing the 1995 Sportster without an SSIS and the foreseeability of harm that would be incurred. Kagan argues that Harley Davidson's warnings about accidents associated with the kickstand coming into contact with the roadway demonstrates the foreseeability of accidents due to the lack of an SSIS. He further contends the risk imposed by the lack of an SSIS is serious because operating a motorcycle with the kickstand not fully retracted results in a greater risk that the kickstand will come into contact with the roadway and either distract the driver or cause the driver to lose control of the motorcycle. Harley Davidson essentially argues that this factor weighs in its favor because there is insufficient risk of harm, as evidenced by the lack of reported accidents caused by the kickstand touching the roadway.

As the Pennsylvania Supreme Court has explained regarding the third factor, "duty only arises when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." *R.W.*, 888 A.2d at 747. Harley Davidson's warnings demonstrate that the risk of an accident occurring because of the kickstand contacting the roadway is foreseeable. King explained that an SSIS could prevent this risk of accidents. Viewing the evidence in the light most favorable to Kagan, there is sufficient evidence to conclude that if the 1995 Sportster had an SSIS, these foreseeable harms would be reduced. Therefore, there is enough evidence for purposes of summary judgment to demonstrate that the third factor weighs in favor of finding a

duty.[32]

4. The consequences of imposing a duty on Harley Davidson.

The fourth factor looks at the consequences of imposing a duty on Harley Davidson to manufacture the 1995 Sportster with an SSIS. Kagan argues that because the cost would have only been approximately twenty dollars per motorcycle, the consequences are minimal and weigh in his favor. Harley Davidson contends that the cost of the added safety feature is irrelevant if the proposed safety feature will not reduce the likelihood of similar accidents occurring, and because there is no evidence here that an SSIS would reduce the likelihood of similar accidents, this factor weights in its favor.[33]

Although Kagan has not provided concrete or statistical evidence that an SSIS would reduce the number of accidents, King opined that an SSIS would reduce the number of similar accidents. Reading this evidence in the light most favorable to Kagan, this demonstrates that the cost of the added safety feature may not be irrelevant. Additionally, Harley Davidson has not refuted the contention that the cost of adding an SSIS would be minimal. Thus, the evidence sufficiently demonstrates for purposes of summary judgment that the fourth factor weighs in

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[32] Although there is sufficient evidence to survive summary judgment, the court notes that contrary to Kagan's assertions, King did not testify that the risks caused by loss of power that results when an SSIS is activated is "clearly outweighed" by the benefits realized when the driver becomes aware that the kickstand is not fully retracted.

[33] Harley Davidson relies on *Berrier*, 413 F. Supp. 2d at 447-48, to support its reasoning that the fourth factor weighs in its favor. The issue under the fourth factor in *Barrier* was not only the lack of evidence that the plaintiff's proposed safety features would actually increase the product's safety, but also the evidence that the plaintiff's proposed safety features would greatly increase operator frustration. Harley Davidson has not provided any evidence that an SSIS would greatly increase operator frustration. Furthermore, although there is evidence that an SSIS would pose separate risk factors, there is also evidence that an SSIS would increase the overall safety of the 1995 Sportster. For these reasons, *Berrier* is not persuasive here.

favor of finding a duty.

5. The overall public interest in implementing an SSIS in the 1995 Sportster.

The fifth prong addresses the overall public interest in Kagan's proposed solution of including an SSIS in the 1995 Sportster. Kagan asserts that there is a public interest in decreasing the risk of accidents caused by the lack of an SSIS. He also reasons that this public interest is great because motorcycle accidents pose a substantial risk not only to motorcycle drivers and passengers, but also to other travelers on the roadway. Kagan also contends that this interest is great because the injuries that could result from motorcycle accidents can be catastrophic. Harley Davidson responds that there is no public interest in imposing a duty on Harley Davidson here because the service manual and Kagan's safety course both instructed him to verify that the kickstand fully retracted before he operated the motorcycle.[34]

As previously discussed, the evidence tends to demonstrate that the inclusion of an SSIS in the 1995 Sportster may have made it safer. The public has an interest in having the safest possible product on the roadway. Therefore, the fifth factor also weighs in favor of finding a duty.

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[34] Harley Davidson again relies on *Berrier*, 413 F. Supp. 2d at 448, to support its contention that the public interest would not be served by finding that Harley Davidson had a duty to design and manufacture the 1995 Sportster with an SSIS. In *Berrier*, the court concluded that this factor weighed in the manufacturer's favor because the plaintiffs had not created a genuine issue of material fact as to whether their proposed safety features would increase the safety value of the product. Here, although Kagan's evidence may be slight, it does create a genuine issue of material fact as to whether an SSIS would have increased the safety value of the 1995 Sportster.

Harley Davidson also asserts that the public interest would not be served in this specific case because the uncontested facts prove that an SSIS would not have prevented this accident. As discussed earlier, there is a genuine issue of material fact as to whether an SSIS would have prevented Kagan's accident.

In conclusion, analyzing all five of the duty factors in the light most favorable to Kagan demonstrates that there are genuine issues of material fact that must be resolved before there can be a determination regarding whether Harley Davidson owed a duty of care to Kagan. Because Kagan has produced sufficient evidence such that there is an issue as to whether Harley Davidson owed him a duty of care, the negligence claim will survive summary judgment. *See Phillips*, 841 A.2d at 1010.

Additionally, there is a genuine issue of material fact regarding causation.[35] Evidence from the accident scene demonstrates that the kickstand may have touched the roadway. King concluded that the kickstand contacting the roadway and the absence of an SSIS contributed to the accident. (King Dep. 143:14-21, 399:20-400:1, 405:17-12.) On the other hand, Carter concluded that the kickstand touching the roadway would not have disturbed Kagan's motorcycle and would not have caused the accident. (Carter Dep. 60:22-61:8, 102:16-103:4.) Viewing the evidence in the light most favorable to Kagan, there is enough evidence that the lack of an SSIS caused the accident for purposes of summary judgment. The court will therefore deny Harley Davidson's motion for summary judgment on Kagan's negligence claim.[36]

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[35] The parties agree that the 1995 Sportster did not have an SSIS, so if Harley Davidson had a duty to design and manufacture the motorcycle with an SSIS, there was a breach of that duty. Additionally, the parties agree that there were damages in the form of injuries to Kagan and his wife.

[36] Harley Davidson additionally argues that it is entitled to summary judgment because Kagan's use of the 1995 Sportster with a bent spring was a superseding cause of the accident. Harley Davidson concedes that this is typically a jury question, but it contends that it is not an appropriate question for a jury here because the only inference that can be drawn from the facts is that the accident would not have occurred if the motorcycle had been in the same condition it was in when it left Harley Davidson's control—i.e., if the kickstand had not had a bent spring. However, given the disputed facts in the record and the expert opinion that it was the lack of an SSIS that caused the accident, there is a genuine issue of fact over causation. Thus, Harley

C. Wrongful Death Claim

Kagan's wrongful death claim is derivative of the tortious acts that would have supported his wife's own cause of action. *See Grbac v. Reading Fair Co.*, 688 F.2d 215, 217 (3d Cir. 1982); *Moyer v. Rubright*, 651 A.2d 1139, 1142-43 (Pa. Super. Ct. 1994). Kagan's strict liability and negligence claims are based on the same accident that resulted in his wife's death; thus, had Kagan's wife survived, her strict liability and negligence claims against Harley Davidson would be the same as Kagan's. Because Kagan's negligence claim will survive summary judgment, the wrongful death claim based on the negligent design theory will also survive summary judgment.

IV. Conclusion

As discussed above, the evidence in the record does not lead to the conclusion that the 1995 Sportster is unreasonably dangerous as a matter of law. Harley Davidson's motion for summary judgment on Kagan's strict liability claim will therefore be granted. Additionally, viewing the facts in the record in the light most favorable to Kagan, there are genuine issues of material fact that must be resolved before there can be a determination as to whether Harley Davidson owed a duty to Kagan to design and manufacture the 1995 Sportster with an SSIS. Harley Davidson's motion for summary judgment on Kagan's negligence claim will therefore be denied. Because Kagan's negligence claim will survive summary judgment, Harley Davidson's motion for summary judgment on Kagan's wrongful death claim on the negligent design theory will also be denied.

An appropriate order follows.

Davidson's motion for summary judgment also will not be granted on this basis.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD KAGAN, Individually and as Trustee *Ad Litem*, Plaintiff,	:	
v.	:	CIVIL ACTION
HARLEY DAVIDSON, INC., A/K/A HARLEY-DAVIDSON MOTOR CO., INC., HARLEY-DAVIDSON MOTOR COMPANY GROUP, INC., BUELL MOTORCYCLE COMPANY, Defendant.	:	NO. 07-0694

Order

AND NOW on this _____ day of August 2008, upon consideration of defendant's motion for summary judgment (Doc. No. 29), plaintiff's response, and defendant's reply thereto; and upon consideration of the parties' supplement memorandums of law on the issues of strict liability and negligence, IT IS HEREBY ORDERED that:

1. Harley Davidson, Inc.'s motion for summary judgment as to Richard Kagan's claim of strict liability (Count I) is GRANTED. Judgment is entered in favor of Harley Davidson and against Kagan as to Count I.

2. Harley Davidson, Inc.'s motion for summary judgment as to Richard Kagan's negligence claim (Count II) is DENIED.

3. Harley Davidson, Inc.'s motion for summary judgment as to Richard Kagan's wrongful death claim (Count IV) is GRANTED insofar as it is based on strict liability and DENIED insofar as it is based on negligence.

4. Trial on Richard Kagan's remaining claims and Harley Davidson, Inc.'s counterclaims is scheduled for Monday, December 15, 2008 at 10:00 a.m.

s/William H. Yohn Jr.
William H. Yohn Jr., Judge